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No. _____

In The

# Supreme Court of the United States

October Term, 1983

LEWIS SERVICE CENTER, INC.,

*Petitioner,*

vs.

MACK TRUCKS, INC.

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTIONS PRESENTED

1. Does the rule of per se illegality still apply to vertical price fixing agreements, or does the rule of reason apply to such restraints on trade, as held by the circuit court in this case?

2. Whether or not a manufacturer commits a per se violation of Section One of the Sherman Act by offering to reduce the wholesale price, contingent upon the dealers agreement to resell the product at a retail price fixed by the manufacturer?

3. Whether or not the court of appeals erred in reversing a jury finding that the manufacturer engaged in a coercive price-fixing arrangement when it enforced its sales assistance program by conducting continuous surveillance of the dealer's resale prices and withholding dealer funds to insure adherence to the manufacturer determined resale price?

4. Whether or not the court of appeals' decision is inconsistent with decisions of this Court and other circuit courts in that resale price maintenance can only be proved by evidence that the manufacturer explicitly and expressly fixed resale prices?

## PARTIES TO THESE PROCEEDINGS

Petitioner, Lewis Service Center, Inc.* was appellee below. Respondent, Mack Trucks, Inc., was appellant below.

Lewis Service Center Inc. is a Nebraska Corporation and its officers and directors are G. B. Lewis and Larry Lewis.

Respondent has listed the following corporations with pecuniary interest:

Mack Trucks, Inc.
2100 Mack Boulevard
Allentown, Pennsylvania 18105

Mack Financial Corporation
2100 Mack Boulevard
Allentown, Pennsylvania 18105
(Mack Financial Corporation
is a wholly-owned subsidiary
of Mack Trucks, Inc.)

The Signal Companies, Inc.
9665 Wilshire Boulevard
Beverly Hills, CA 90212
(The Signal Companies, Inc.
is an owner of shares of
Mack Trucks, Inc.)

Regie Nationale des Usines
Renault 34, Quai du Point
du Jour 92109, Boulogne
Billancourt, France
(Renault is an owner of
shares of Mack Trucks, Inc.)

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*Lewis Service Center, Inc., is now a Debtor in Possession, having filed a Chapter 11 Bankruptcy.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Lewis Service Center. Inc., respectfully requests that a writ of certiorari issue to review the judgment and decision of the Court of Appeals of the Eighth Circuit entered on November 4, 1983.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 714 F.2d 842 (8th Cir. 1983) and appears as Appendix A. The opinion of the District Court denying the Motions for Summary Judgment appears as Appendix B. The unreported opinion of the District Court denying Respondent's Motion for Judgment Notwithstanding the Verdict and a New Trial appears as Appendix C. The opinion of the Court of Appeals for the Eighth Circuit denying rehearing appears as Appendix D.

## JURISDICTION

The judgment of the Court of Appeals was entered August 18, 1983. A timely Petition for Rehearing or Rehearing en banc was denied on November 4, 1983. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

## STATEMENT OF THE CASE

In 1968, this Court reversed a holding of the Eighth Circuit Court of Appeals that a resale price maintenance arrangement, in which a newspaper publisher fixed maximum prices to be charged by independent distributors,

was permissible because it was not injurious to the public. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). The Court rejected the Eighth Circuit's holding and held that maximum resale price fixing schemes intrude on the ability of buyers to make independent pricing decisions, diminish dealer's economic viability, and are illegal per se under the Sherman Act, irrespective of any alleged public benefits from the practice.

In this case, the Eighth Circuit decision completely nullifies that part of § 1 of the Sherman Act which prohibits vertical price fixing by a mere agreement to reduce the wholesale cost of the commodity to the distributor and appears to be an attempt to overrule the Court's holding in *Albrecht v. Herald Co.*, supra. The Eighth Circuit Court of Appeals has again held that a form of resale price maintenance is permissible under the Sherman Act because of conjectural economic and consumer benefits and should be analyzed under the more lenient rule of reason. It is incumbent upon this Court to grant certiorari in this case to review the decision of the circuit court and reaffirm its position that resale price maintenance is per se illegal under the antitrust laws.

This case appears to be an obvious attempt by the Eighth Circuit Court of Appeals again to change the law. As early as 1940, in *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, and as recently as 1982 in *Arizona v. Maricopa County Medical Society*, 475 U.S. 332, 102 S.Ct. 2466 (1982), the Court admonished that those wishing to change the per se rule in vertical and horizontal price fixing cases must do so through Congress. The current Congress has been most adamant in rejecting efforts to modify

the applicability of the per se rule in vertical price fixing cases. *See e.g.*, H.R. 2912, 98th Cong., 1st Sess. § 14 (1983); S.J. Res. 105, 98th Cong., 1st Sess. (1983); H.R. Report on H.R. 2912, 19-22 (1983) (Appendix E).

The court of appeals in this case decided that Mack's action did not constitute resale price maintenance or price fixing because there was no evidence that Mack fixed an *explicit* resale price. 714 F.2d at 846. Having made this error, the Court then decided that the per se rule should not be applied. By disregarding the teachings of this Court, the lower court failed to make the threshold decisions required in all antitrust cases: Is the purpose or effect of the challenged action to fix or maintain resale prices? Instead, the court of appeals engaged in a classic case of circular logic and found that the rule of reason should govern Mack's sales assistance program by stating:

> In each case cited by Lewis in support of applying a per se standard, the challenged restraint involved either explicit price fixing, where the manufacturer dictated the exact resale price . . .
>
> . . .
>
> In the instant case, Mack simply determined the maximum amount, based on the information supplied to Mack by the dealer, by which Mack is willing to reduce its wholesale price (and thereby its profit) in order to assist the dealer in selling a Mack truck. In granting such a discount, Mack may *require* the dealer to reduce its own profit as well. (emphasis added.) *Id.* at 846.

**1. Factual Background**

At issue here is the price of a truck. For several years now, Mack Trucks, Inc., (Mack) the appellant below, published a chassis list with dealer cost prices which was

uniform to all dealers. However, because the uniform dealer prices were so high,[1] they were non-competitive in the truck market. Mack therefore instituted the "sales assistance program," purportedly to allow its dealers to make reductions in price to customers, but in fact to control dealers' resale prices on the truck chassis, parts and accessories. Petitioner, Lewis Service Center, Inc., (Lewis), is a large Mack dealer in Lincoln, Nebraska, and has frequently used the sales assistance program.

The sales assistance program is descriptively simple and proved to be a powerful weapon in Mack's ability to set the retail price at the consumer level. A dealer, faced with a prospective customer who balks at Mack's high price, is required to use the sales assistance program, which has a couple of phases. First, Mack requires that the dealer divulge the terms of the retail situation, including the name of the customer and the competitor's price. Then, one person in Mack, a Vice President in Marketing Distribution, sets the amount of sales assistance to the dealer and establishes the resale price to that customer. The amount of gross profit to the dealer is also established solely by that Mack Vice President who mandates a price and profit review of the dealer's charges for local extras, factory extras, freight and dealer preparation. The dealer is limited to a 0% to 4% profit, whatever that

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[1]Evidence at trial showed that Mack's dealer prices were approximately $8,000 above dealer prices for similarly-equipped vehicles as set by Mack's principal competitors. Mack, however, faced a competitive market for the sale of trucks. It is the second largest manufacturer of these trucks with 18.4% of the entire domestic market. International Harvester has 24% of the market; Paccar has 18%; GMC has 13% and various fringe firms make out the rest of the market.

Vice President decides on the spot. Conventionally, the break-even point for a dealer is 8% and Mack recommends to its dealers a markup of 10% to 13% to maintain economic viability. Obviously, the difference between the Mack recommended profitability figures and the profit Mack permits on sales assistance transactions represent the diminished ability to compete. Mack then agrees to reduce its wholesale price to the dealer, requiring the dealer to sell to the named customer at the Mack-specified resale price and allocating only the Mack-specified profit to the dealer.

The effect of sales assistance on the dealer and its customer is direct. At the point that the dealer obtains sales assistance from Mack, the dealer is locked into the sales assistance retail price and the dealer is unable to sell the truck for more than the sales assistance price. The dealer can neither increase its profit nor engage in further negotiation with the customer. The transaction is simply frozen into or at the resale price which Mack has dictated.[2]

If the dealer sells for more than the Mack-dictated price, Mack retains the dealer funds and refuses to give

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[2]For example, the dealer chassis cost is $50,000. If the dealer desires a 10% profit, he must sell the truck for $55,000. If, however, as in the usual case, the dealer cannot make the sale at $55,000, he obtains sales assistance from Mack. Mack then allows the dealer $5,000 in sales assistance, but allows only $1,000 profit on the sale. Mack requires that the dealer sell the truck to the customer at $46,000. If Mack decides to allow the dealer a $500 profit, Mack requires the dealer to sell it at $45,500. In other words, the dealer loses the ability to negotiate the retail sale price of the truck at any price between $46,000 (or $45,500) and $55,000, whenever sales assistance is involved.

any rebate to the customer. If the dealer sells for less than the Mack-dictated price, the dealer stands the loss. If the customer refuses to accept delivery or cancels his order, the dealer stands the loss and the price reverts to the published wholesale dealer list price.[3]

The market impact of the sales assistance program is substantial in many respects. Mack sells 18.4% of all the relevant trucks sold in the United States. Approximately 70% of the trucks sold in the relevant market were sold under the sales assistance program.[4] For various regional reasons some dealers use Mack's program more than others, but the comparatively high wholesale price on Mack trucks compels dealer use of the Mack-instituted program.

The sales assistance program was made effective by the close monitoring and financial reporting requirements imposed by Mack. Mack's system of coercive reparations is reinforced by a requirement that each truck must be paid for immediately upon completion at the factory. At that time, through a power of attorney executed by the dealer, a Mack employee signs a note obligating the dealer to pay the full dealer list price. The note is held, collected

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[3]Using the same facts as footnote 2, if the dealer does not adhere to Mack's terms of the resale to the customer, Mack then charges the dealer the full $50,000 even though the dealer may have sold it for $48,000. If the dealer sells the vehicle for $45,000, he loses his $1,000 profit.

[4]The affected geographic market in this case is the Kansas City-Omaha-Lincoln trade area. Kansas City Mack in 1980 sold 97% of its trucks by means of sales assistance. Wise Mack, Omaha, Nebraska, had a three-year (1977, 1978, 1981) average of 59.6% and Lewis Service Center during 1977, 1978 and 1980 averaged 66%.

and enforced by Mack Financial Corporation. Following delivery of the vehicle to the customer, the dealer must certify to Mack the retail price of the vehicle, often to include sending a copy of the customer's check for the truck. Mack Financial and Mack hold the sales assistance monies until satisfactory proof is received that the vehicle resale price was exactly as fixed by Mack. Mack retains the ability to settle accounts unilaterally by withdrawing dealer funds from an account maintained by Mack for each dealer.[5]

The sales assistance program has had an effect on retail prices for Mack trucks and on the ability of Mack dealers to remain financially sound. Mack specifies the amount of dealer profit on the transaction. By locking the dealer into the sales assistance price, Mack insures that the dealer cannot derive any additional benefit from the wholesale price reduction by Mack other than the amount of profit determined by Mack. However, Mack also warned its dealers that a dealer-profit of at least 10% was needed to remain viable, but only allows a maximum of 4% in sales assistance transactions.

**2. Judicial Proceedings Below**

Lewis filed an antitrust action claiming that the sales assistance program, as administered by Mack, was a restraint of trade in two important respects. First, Lewis claimed that since the purpose and effect of the sales as-

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[5]For example, Mack withdrew over $51,000 from the Lewis' dealer account. This unilateral act occurred in June, 1981, after this action was commenced. Mack termed the withdrawal a sales assistance reversal because the dealer had not adhered to the sales assistance terms.

sistance program was effectively to freeze or lock the resale price of Mack trucks, not at levels established by competitive conditions, but rather unilaterally by Mack Trucks, that the program constituted a resale price maintenance or maximum price fixing arrangement. Since this Court has consistently held resale price maintenance per se illegal, Lewis argued that Mack's sales assistance program was illegal on its face. Second, Lewis argued that because the purpose behind the sales assistance program was to narrow the range of negotiation between the dealer and the customer in terms of the vehicle's sale price and because the use of sales assistance was so widespread throughout the geographic area, the practice should be characterized as vertical price fixing and should therefore be condemned as per se illegal. After trial, the jury concluded that Mack had engaged in resale price fixing in the operation of its sales assistance program. The trial court affirmed the jury verdict, denying Mack's motion for judgment notwithstanding the verdict (Appendix C).

The Eighth Circuit Court of Appeals reversed the jury verdict, concluding that the sales assistance program was not vertical price fixing and therefore not illegal per se and invoked a rule of reason standard. The circuit court also held that the rule of reason is the appropriate standard for evaluating the permissibility of sales assistance programs. In its decision, the court of appeals substituted its judgment for the determination of the jury and held that the evidence showed no coercive conduct by Mack in freezing resale prices under the sales assistance program merely because Mack did not threaten to terminate the franchise.

The circuit court reasoned that the Mack sales assistance program is not resale price maintenance because "Mack does not suggest an alternative price to" dealers and does not require the dealer to adhere to the original price estimate. 714 F.2d at 845. Rather, according to the court, the dealer can forego sales assistance if he or she is dissatisfied with Mack's imposed price. Incredibly, the court also held that resale price maintenance is per se illegal only "where the manufacturer dictated the exact resale price, termination (sic), threats of termination, or the agreements were horizontal." *Id.* at 845-46. (citations omitted). The circuit court, in making the following characterization of the sales assistance program, virtually conceded that Mack fixed retail prices through sales assistance:

> In the instant case, Mack simply determined the maximum amount, based on the information supplied to Mack by the dealer, by which Mack is willing to reduce its wholesale price (and thereby its profit) in order to assist the dealer in selling a Mack truck. In granting such a discount, Mack may require the dealer to reduce its own profit as well. Mack has a right to insure that the discount it affords its dealers is passed on to the customer. We cannot accept Lewis' argument that Mack must lower its wholesale price to a figure Lewis deems attractive without requiring a commensurate reduction on Lewis' part. *Id.* at 846.

In the remainder of the court's opinion, the panel argued that the rule of reason was the appropriate standard of antitrust review because the purpose of the program was to enhance Mack's ability to compete against other truck manufacturers, and that Lewis had failed to demonstrate that the program was an unreasonable restraint on trade. By this petition for certiorari, Lewis is requesting that this court again instruct the Eighth Circuit Court of

Appeals that proper characterization of restrictive conduct is essential to sound analysis under § 1 of the Sherman Act and that resale price maintenance, in whatever form and for whatever reason, is per se illegal. A strong statement from this Court is necessary to resolve a substantial, and growing, conflict among the circuits on this issue and to thwart the further development of a dangerous practice.

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## REASONS FOR GRANTING THE WRIT

The court of appeals in this case mischaracterized the purpose and effect of the Mack sales assistance program. The obvious purpose of the program was to place a ceiling on the price at which Mack trucks were sold by dealers to certain specified consumers. The effect of the sales assistance program was equally to exert a maximum resale price maintenance plan by Mack forcing dealers to adhere to a resale price for a truck prior to the final negotiation with the customer and to lock the dealer into a final retail price set by Mack's Vice President of Marketing.

The court of appeals also erred in holding that resale price maintenance can be proved only by evidence that the manufacturer explicitly mentioned or established the exact resale price. The court rejected Lewis' argument that resale price maintenance can be proved by evidence that the effect of the program was to maintain retail prices with a maximum price fixed on each sale. Further, the court of appeals erred when it refused to acknowledge that coercion can result from something other than a threat of

termination. These holdings by the Eighth Circuit Court of Appeals are inconsistent with the decisions of other courts of appeal and do not accord with this Court's pronouncements on the subject of proof of vertical price fixing. Likewise the lower court erred in concluding that this vertical price maintenance scheme should be analyzed under the rule of reason.

This Court has considerable experience with maximum vertical price fixing arrangements and has uniformly found them "manifestly anti-competitive" and without redeeming virtue. The lower court's ruling should be set aside because it directly conflicts with this Court's pronouncements and distorts established antitrust policy.

## I.

### The sales assistance program implemented by Mack Trucks is a form of resale price maintenance effected by establishing the maximum price on retail sales by its dealers.

The effect of the Eighth Circuit Court's decision is to nullify vertical price fixing as a per se restraint of trade where a manufacturer establishes an artificially high noncompetitive dealer cost, but agrees to reduce the dealer cost if the dealer agrees to resell the product at the price fixed by the manufacturer. The Eighth Circuit Court of Appeals held that the vertical price restraint in this case should be evaluated under the rule of reason. 714 F.2d at 845. The holding of the circuit court is in direct conflict with the decisions of the Court and decisions of other appellate courts.

The Supreme Court has consistently held that vertical price restraints are illegal on their face. In *United States*

*v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 720-721 (1944), the Supreme Court stated:

> Price fixing, reasonable or unreasonable, is unlawful per se . . . Softlight is the distributor of an unpatented article. It sells to its wholesalers at prices satisfactory to itself. Beyond that point, it may not project its power over the prices of its wholesale customer by agreement. A distributor of a trademarked article may not lawfully limit by agreement, express or implied, a price at which it, or the other person to whom its purchaser may resell.

*See also California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951).[6]

The Supreme Court has consistently held that price fixing—either vertical or horizontal—may be proved by demonstrating any effect on price. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). In the *Socony-Vacuum* case, the Court held that it was enough if the buying programs of the combination resulted in a price rise and market stability which but for them would not

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[6]As the Court reiterated in the *California Retail Liquor Dealers Association* case:

> Such vertical control destroys horizontal competition as if wholesalers 'formed a combination and endeavored to establish the same restriction . . . by agreement with each other.'

445 U.S. at 103.

have happened.[7] This has been the rule in price fixing cases for over forty-five years.

Other courts have held that a manufacturer need not establish an exact resale price for the arrangement to be characterized as resale price maintenance; rather, any conduct with the purpose or effect of "restraining price movement and the free play of market forces" is price fixing. *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168-69 (3d Cir. 1979). *See also Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 463-64 (9th Cir. 1964). This Court, in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), stated that maximum price fixing may result in a price fixed too low to insure the economic viability of dealers and the possibility of greater concentration of sources of supply. 390 U.S. at 152. In discussing the possibility that the fixed price may fluctuate but still result in resale price maintenance, the Court stated that:

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[7]Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price-fixing, as used in the Trenton Potteries Co. Case has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. That price-fixing includes more than the mere establishment of uniform prices is clearly evident from the Trenton Potteries Co. Case itself, where this Court noted with approval Swift & Co. v. United States, 196 U.S. 375, 19 L.Ed. 518, 25 S.Ct. 276, in which a decree was affirmed or fixing uniform prices' at which meats will be sold. Hence, prices are fixed within the meaning of the Trenton Potteries Co. Case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon. And the fact that, as here, they are fixed at the fair going market price, is immaterial. 310 U.S. at 222.

> "if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices." *Id.* at 152-53.

Lewis proved at trial that the purpose and effect of Mack's sales assistance program is the establishment of a resale price on each sale which advanced only Mack's desires and interests. The substance of Mack's sales assistance program requires examination.

Unlike other commodities (such as gasoline which is sold as ethyl or regular), a truck is identified and sold by a model number. However, because of varying components and specifications, every truck is different, and has a different price, even though each bears the same model number. This prevails throughout the domestic truck market.

Under the sales assistance program, the resale price is determined by seven factors—chassis, factory extras, local extras, freight, dealer preparation, surcharge and profit allowed to dealer.[8] The total of these seven com-

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[8]1. *Chassis:* The foundation of the vehicle. This inflated chassis price is noncompetitive and is contained in the published dealer-cost price list. Mack determines the chassis resale price to the customer.

2. *Factory Extras:* Components and modification specified to the factory, such as wheel base, springs, transmission, or engine, etc. Mack determines the consumer price of these items.

3. *Local Extras:* Items procured locally and installed on the truck by the dealer. Even though those items are not sold by

(Continued on the following page)

ponents, each of which is fixed by Mack including the profit allowed the dealer, is the resale price of the truck. The critical distinction which the lower court missed concerns the uniformity of results achieved by the program. The resale prices on trucks are not uniform because the trucks are not the same for all purchasers. There is a uniform procedure or formula which is always followed to determine resale prices. And, as argued by Lewis, it is the sales assistance procedure or formula which always locks in dealer resale prices at a price determined by Mack.

In this case the profit margin to the dealer is set by Mack and that may not exceed 4%; however, Mack also strongly recommends to prospective and existing dealers that they obtain a gross profit of 10% to 13%. A dealer simply cannot remain economically viable under the imposed 4% margin.

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Mack, under the sales assistance program, Mack examines the price of them. If the price exceeds what Mack determines it should be, the amount of sales assistance is reduced or withdrawn.

4. *Freight:* The cost to the dealer to transport a truck from Allentown, Pennsylvania to the dealer is also reviewed and determined by Mack.

5. *Dealer Preparation:* The cost incurred by the dealer for labor and service to prepare a vehicle for final delivery to the customer; again, Mack reviews and specifies what the dealer may charge the customer.

6. *Surcharge:* The Federal excise tax, determined by the United States Government.

7. *Profit Allowed Dealer Selling the Vehicle to the Consumer:* The dealer's profit is determined solely by the Mack Vice President of Marketing, and may not exceed 4% of the published chassis list price. (Ex. 33).

In this case the evidence proved, and the jury found, that Mack's sales assistance program compressed retail prices for Mack trucks in a significant part of interstate commerce. About 70% of the sales of Mack trucks in the relevant market were sold under the sales assistance program. Clearly, Mack exerted power in the market, Mack truck sales being 18.4% of the entire truck market. Dealers such as Lewis, obliged to use sales assistance, were severely constrained in their ability to remain profitable. The resultant impact is higher prices to consumers for parts, labor and service. Purchasers were very explicit about the importance of dealer service when buying a truck, but they also recognized a profit must be made to provide that service. The evidence proved, and the jury found, that dealers needed approximately 10% profit on sales to cover dealer services, but that the sales assistance program limited dealer profit to 4% or less on such sales. Insolvency has been the ultimate fate of Mack dealers who have had to participate in a sales assistance program to any significant degree. The insolvent dealer is removed from the competing market as effectively as the terminated dealer.

The court of appeals' holding that a plaintiff must demonstrate that the manufacturer fixed an exact resale price as a precondition to finding that the manufacturer engaged in resale price maintenance is inconsistent with the decisions of this Court and with other appellate courts, and this Court should reverse the lower court's incorrect and damaging holding in this case.

## II.

**The Court of Appeals erred in concluding that Mack's sales assistance program was not coercive and undertaken with the purpose of fixing maximum resale prices.**

In its opinion, the Eighth Circuit Court of Appeals also held that the range of conduct by a manufacturer which may be characterized as resale price maintenance is limited to an explicit and exact price set by the manufacturer, where the manufacturer terminates, or threatens to terminate, a dealer, or where the agreements are horizontal. Moreover, the court held that Mack's sales assistance program did not fall into any of those categories and was therefore not resale price maintenance. This holding is flatly inconsistent with the decisions of this Court and courts of appeal which have held that other marketing assistance programs which are implemented by manufacturer "coercion" with a purpose and effect of enforcing resale prices do constitute resale price maintenance.

This Court, in *U. S. v. Parke Davis & Co.*, 362 U.S. 29 (1960) stated that coercion exists if adherence is by means other than a refusal to deal.

The courts of appeal have adopted this principle that manufacturer coercion may be demonstrated in various ways including price surveillance and monitoring of the dealer's business transactions, terminations, and other menancing conduct toward dealers. See *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, (7th Cir. 1982) *cert. granted*, — U.S. —, 103 S.Ct. 3533 (1983), *Yentsch v. Texaco*, 630 F.2d 46 (2d Cir. 1980); *Reed Bros., Inc. v. Monsanto Co.*, 525 F.2d 486 (8th Cir. 1975); *Lehrmann v. Gulf*

*Oil Co.*, 464 F.2d 26 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972).

The essential factor in resale price maintenance cases, where a manufacturer has imposed terms or conditions on its dealers to insure conformity with its desire to stabilize retail prices, is the quality of proof that the manufacturer coerced the dealer into accepting the price-fixing terms. Threats of termination are only one form of proof of coercion. *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d at 1238-39. However, in this case the jury was presented with ample proof that the operation of the sales assistance program, coupled with Mack's uncompetively high dealer list prices, was intended to force dealer utilization of the program and to insure that retail sales under the program were made at the price determined by Mack. Without contradiction the evidence showed that Mack maintained a reserve of funds due each dealer which served as a treasury from which Mack could, and did, limit dealers net return on sales. Through the power of attorney and signing the note to Mack Financial, Mack extracted the full dealer list price from the dealer for each truck at the time the truck was built. In other words, the dealer was required to pay the full wholesale price for the truck prior to receiving it. The agreement to lower the wholesale price was based upon the dealer delivering the truck to the named customer, and then certifying to Mack that the resale price fixed by Mack had been adhered to. Only then can the dealer get his money back. Price surveillance and resale price monitoring was a unilateral decision by Mack; the dealer has no say in the decision as to the use of the funds or getting them back, and the dealer pays interest to Mack Financial on those funds in the interim.

The court of appeals was apparently swayed by the fact that a dealer did not need to avail himself of the benefits of the sales assistance program. Although Mack publishes a uniform price list to the dealers, Mack advertises to the dealers that upon request Mack will reduce that wholesale price. Mack's scheme, then, encourages the dealer's request for sales assistance and thereby increases Mack's opportunity for fixing the final sale price to customers. The evidence showed that for many dealers the reduction in wholesale price under the sales assistance program was the only way for those dealers to sell Mack trucks, because of the artificially inflated dealer cost. Moreover, the evidence showed that a very significant number of Mack truck sales were made under the program. It was the only method by which dealers could compete at retail with Mack's competitors.

The lower court in this case erroneously relied on cases like *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203 (10th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 1903 (1983), in making the bold assertion that the per se rule should not apply to sales assistance programs.[9] The Court's reliance on *AAA Liquor's* lacks the analytic quality which proper characterization of restrictive conduct requires in antitrust cases. *AAA Liquor's* is a different case because there the finder of fact specifically found no coercion by the manufacturer and that issue was not contested, while in this case the jury found that Mack's sales assistance program was coercive. Further, in *AAA Liquors* there was no contention that the retail price to the consumer was fixed; that is

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[9]*See also Butera v. Sun Oil Co.*, 496 F.2d 434 (1st Cir. 1974); *Sun Oil v. Vickers Refining Co.*, 414 F.2d 383 (8th Cir. 1969).

exactly contrary to this case. While there are other distinguishing aspects between the cases, the critical analytic point is that coercive behavior by the manufacturer in imposing price-affecting terms is important proof that the purpose or effect of the arrangement is the fixing of retail price. In this case the appellate court merely held that "We fail to see how a trier of fact could find such a program to be coercive price fixing." Besides robbing the jury of its importance, the appellate court's baseless conclusion destroys significant antitrust policy by diminishing the role of conduct characterization in antitrust litigation.

## III.

**The Court of Appeals erred in concluding that Mack's sales assistance program should not be analyzed under the per se rule because courts lack experience with such restraints.**

This Court recently gave clear guidance to the lower courts in analyzing business practices and conduct which affect prices. *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 102 S.Ct. 2466 (1982). The Court held that federal courts should disregard claims by defendants that industry practices which exert a stabilizing effect on prices may be beneficial, and must condemn as per se illegal all such practices. The court of appeals disregarded the recent guidelines set down by the Court in *Maricopa County Medical Society* and held that the plaintiff bears the burden of proving the unreasonableness of a vertical price fixing scheme.

The Supreme Court has cautioned against applying a per se standard to vertical price restraints unless they

> are shown to have a 'pernicious effect on competition,' or that they lack 'any redeeming virtue' . . .
>
> Per se rules of illegality are appropriate only when they relate to conduct that is 'manifestly anticompetitive' . . .
>
> The record shows no basis for finding that Mack's sales assistance program constitutes price-fixing or that this program creates a 'pernicious effect on competition.' Thus, we determine that the district court abused its discretion in applying a per se rather than a rule of reason standard. 714 F.2d at 847.

The Eighth Circuit then went on to apply a rule of reason analysis, even though the case was tried as a per se case, and since no evidence was introduced showing that the effect of this pricing plan was "manifestly anticompetitive," the case was dismissed rather than remanded for a new trial or affirming the judgment of the District Court. The lower court's misapplication of controlling and consistent Supreme Court precedent and usurpation of the jury's function is indefensible.

The application of the per se rule and the basis for not applying the rule of reason to price fixing cases is found in the recent case of *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466 (1982). In that case, the Court held:

> Our decisions foreclose the argument that the agreements at issue escape per se condemnation because they are horizontal and fix maximum prices. *Kiefer-Stewart* and *Albrecht* place horizontal agreements to fix maximum prices on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices. The per se rule 'is grounded on faith in price competition as a market force (and not) on a policy of low selling prices at the price of eliminating competition.' *Id.* at —, 102 S.Ct. 2475.

Both cases relied upon by the Court are vertical cases, and the Court has reiterated and reaffirmed the principle that the reasonableness or unreasonableness of price fixing situations is not an issue in vertical or horizontal price fixing cases. Rather, whenever the fact finder concludes that the purpose or effect of the challenged conduct is to stabilize or fix prices, then the per se rule is applicable.

The Eighth Circuit Court of Appeals has disregarded the Court's statement that practices which have the purpose or effect of fixing prices are per se illegal, irrespective of the endency of such practices to enhance interbrand competition. *Continental T.V. v. GTE Sylvania,* 433 U.S. 36 (1977).

First, the court of appeals erred in mischaracterizing the purpose and effect of the sales assistance program. The court made repeated references to Mack's ostensible motive or objective in establishing and maintaining the program as fostering interbrand competition. This may be a sufficient objective in the case of a *non-price* restriction imposed by a manufacturer, but it is not a sufficient defense to a case involving a *price* restriction. The purpose of the program was to constrain the retail price of Mack trucks and thereby increase sales. Because Mack chose a price restricting method of enhancing its retail sales and that method had a clear and proven effect on the ability of Mack dealers such as Lewis to remain viable and independent, the program must be analyzed under the more stringent per se rule.[10]

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[10]Lewis does not argue that the sales assistance program had no intended effect on Mack's ability to compete at retail

(Continued on the following page)

Next, the court erred in concluding that because there are no cases, "in which a program such as Mack's has been found illegal," the courts do not have sufficient judicial experience with the restraint to place it in the per se category, and must, therefore, apply the rule of reason. The Court in *Arizona v. Maricopa County Medical Society*, noted that while the courts did not have experience with the challenged conduct in the medical industry, the courts did have experience with maximum price fixing by competitors and that such conduct is per se illegal irrespective of its contextual novelty. Similarly, courts have experience with vertical maximum price fixing arrangements which are carried out by coercive practices by the manufacturer, and those arrangements have been consistently condemned as per se illegal. See *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 311 (1951); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944). The lower court's application of the more lenient rule of reason to

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(Continued from the previous page)

on certain customers. In fact, Lewis would concede that Mack used the sales assistance program to foster interbrand competition at retail. The court of appeals seized on this point to conclude that the rule of reason should be applied in this case. The lower court's decision is consistent with arguments that resale price maintenance arrangements should be analyzed under the rule of reason, rather than the per se rule. See Posner, "The Rule of Reason and the Economic Approach: Reflections on the *Sylvania* Decision," 45 U. Chi. L. Rev. 1 (1977). However, it is Lewis' contention—both here and before the court of appeals—that the per se rule should apply in this case, and all other vertical price fixing cases, irrespective of any real or imagined positive contributions to interbrand competition occasioned by the arrangement. Resale price maintenance, and especially maximum vertical price fixing, has substantial and demonstrable economic and commercial harms to warrant continued condemnation under the standard of per se illegality.

the type of resale price maintenance shown in this case is a gross distortion of antitrust law and policy.

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## CONCLUSION

If allowed to stand, the Mack price fixing scheme may spread to every truck manufacturer and to manufacturers of automobiles, construction machinery, farm implements and other high-retail priced commodities. The manufacturer need only inflate its wholesale price, compelling the dealer to seek factory assistance. Then by controlling the profit margin of dealers, the economic viability of the dealer is destroyed, reducing them to merely a support center for service and parts. Commercial individuality and freedom to compete—the mainstay of our national policy to protect small business men and women—will give way to aggregates of manufacturer-owned retail outlets. Every sale will be controlled by and centralized with the manufacturer, opening the door to the concurrent market abuse that inevitably follows when the source of supply becomes concentrated with the few.

The Court should grant this petition for certiorari and reverse the decision of the court of appeals. The jury found that Mack's sales assistance program amounted to resale price maintenance because it constrained the retail prices at which Lewis could sell its vehicles and because Mack implemented the program by coercive means. The court of appeals decision in this case is inconsistent with the decisions of this Court and with the decisions of other circuit courts of appeal. More importantly, the lower

court's holding that explicit price fixing must be proven and that the per se rule does not apply to the type of vertical price fixing proven in this case contravenes the sound and longstanding antitrust policy condemning maximum price fixing.

Respectfully submitted,

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## APPENDIX A

LEWIS SERVICE CENTER, INC., a Corporation, Appellee,

v.

MACK TRUCKS, INC., a Corporation, Appellant.

No. 82-2158.

United States Court of Appeals, Eighth Circuit.

Submitted May 19, 1983.

Decided Aug. 18, 1983.

Truck dealer brought action against manufacturer under section one of the Sherman Act, challenging manufacturer's "sales assistance program" whereby manufacturer gave dealer reduced wholesale price to enable dealer to meet retail price competition. The United States District Court for the District of Nebraska, Warren K. Urbom, Chief Judge, entered judgment enforcing jury verdict and award against manufacturer for treble damages plus costs and attorney fees, and manufacturer appealed. The Court of Appeals, Bright, Circuit Judge, held that: (1) vertical restraints in the case should not have been evaluated under per se standard of illegality, and (2) manufacturer's discount program had not been shown to have been manifestly anti-competitive and, under rule-of-reason standard, did not violate the Sherman Act.

Reversed and remanded with directions.

1. Monopolies 12 (1.10)

Under rule-of-reason analysis in an action brought under section one of the Sherman Act, factfinder must scrutinize intent and effect of practice challenged, and determine whether the particular practice increases or impairs competition. Sherman Anti-Trust Act, § 1, 15 U.S. C.A. § 1.

2. Monopolies 17(1.10)

Truck manufacturer's sales assistance program did not constitute price fixing and, consequently, should not have triggered application of a per se standard of liability in action under section one of the Sherman Act. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

3. Monopolies 12(1.10)

Factors to be considered in a section one Sherman Act action under rule of reason standard include nature and effect of the restraint, "evil" believed to exist, purpose or end sought to be obtained, and intent of party imposing restraint. Sherman Anti-Thust Act, § 1, 15 U.S. C.A. § 1.

4. Monopolies 17(1.3)

Truck manufacturer's discount program whereby it reduced its wholesale price in order to assist dealers in selling trucks was not manifestly anticompetitive and, under rule-of-reason standard, did not violate section one of the Sherman Act. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

Latham, Watkins & Hills, Carla A. Hills, Reed E. Hundt, Maureen E. Mahoney, Edward J. Shapiro, Wash-

ington, D.C., Cline, Williams, Wright, Johnson & Oldfather, David R. Buntain, Patricia C. Shaffer, Lincoln, Neb., for appellant, Mack Trucks, Inc.

Law Offices of Cobb & Rehm, P.C., Lincoln, Neb., for appellee, Lewis Service Center, Inc.

Before BRIGHT and McMILLIAN, Circuit Judges, and NICHOL, Senior District Judge.*

BRIGHT, Circuit Judge.

In this antitrust action, Mack Trucks, Inc. (Mack) appeals from the district court's judgment enforcing a jury verdict and award against Mack for $900,000 in treble damages plus attorneys' fees of $202,558.70 and $10,437.33 in costs. The jury found that Mack's "sales assistance program," whereby from 1977 to 1980 Mack gave its dealer, Lewis Service Center, Inc. (Lewis), a reduced wholesale price to meet retail price competition, constituted price fixing in violation of section one of the Sherman Act. Mack contends the trial court improperly instructed the jury on the standard for determining liability for price fixing under the Sherman Act, and that, even under the standard applied, the evidence is insufficient to support a finding that Mack engaged in price fixing. Because we agree that under the undisputed evidence Mack's sales assistance program does not violate the Sherman Act, we reverse.

I. *Background.*

Lewis operates a dealership in Lincoln, Nebraska, selling trucks manufactured by Mack. As one of Mack's

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* FRED J. NICHOL, United States Senior District Judge for the District of South Dakota, sitting by designation.

dealers, Lewis may participate in Mack's nation-wide "sales assistance program," under which Mack reduces its standard wholesale price to dealers on a case-by-case basis when dealers cannot meet interbrand competition from other truck dealers. To participate in the sales assistance program, a dealer submits an application to Mack setting forth the resale price the dealer estimates it can obtain from a particular customer, and identifies the interbrand competition that necessitates offering a lower resale price for a Mack brand truck.

If Mack decides to grant sales assistance, Mack agrees to reduce its wholesale price to the dealer by an amount that guarantees the dealer a specified minimum profit on the sale (generally 4 percent of the chassis list price). After the dealer reaches an agreement with its customer and orders the truck, Mack builds the truck to specifications and sells it to the dealer at the standard wholesale price.[1] Pursuant to a power of attorney, Mack executes a note on the dealer's behalf for the full price of the truck and places the note for collection with Mack Financial Corporation, Mack's wholly-owned subsidiary.

After the dealer resells the truck to its customer, the dealer reports its final sale price and costs to Mack. If the dealer obtained a profit less than the minimum guaranteed by Mack at the time Mack granted sales assistance, Mack reduces the standard wholesale price and credits the dealer's "parts" account by the amount necessary to raise the dealer's profit to the guaranteed amount. If the dealer's profit exceeded the guaranteed

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[1]The truck sales in issue are those that are "custom" ordered.

amount, Mack either charges the dealer its standard wholesale price, granting no sales assistance credit, or reduces the wholesale price only to the extent necessary to allow the dealer the guaranteed profit.

At trial, Lewis contended that Mack's sales assistance program constituted resale price maintenance in violation of section one of the Sherman Act. Lewis argued that by setting its standard wholesale price artificially high, Mack forced Lewis to apply for sales assistance, thus coercing Lewis to sell its trucks at a price that unduly limited Lewis' profit and denied Lewis the opportunity to negotiate its prices. In the alternative, Lewis contended that Mack and Mack Financial, as separate entities, conspired to fix the retail price of trucks sold by Lewis. The district court submitted the case to the jury on both theories of liability.

On June 18, 1982, the jury rendered a general verdict in favor of Lewis, awarding $300,000 in damages. The district court denied Mack's motions for judgment notwithstanding the verdict and a new trial, finding that "there was evidence from which a jury reasonably could find that [Lewis'] theories were factually supported." The court then trebled damages to $900,000, and awarded Lewis $202,558.70 in attorneys' fees and $10,437.33 in costs, for a total of $1,112,996.03.

On appeal, Mack argues that the district court erred in submitting the case to the jury for evaluation under a per se standard of liability rather than a "rule of reason" standard. Mack argues that the jury could not have held for Lewis under a rule of reason analysis because Lewis presented no evidence showing that Mack's pro-

gram had an anticompetitive effect on the market. Moreover, Mack argues that even under the per se standard of illegality, Lewis failed to present sufficient evidence to show that Mack's sales assistance program constituted price fixing within the meaning of the Sherman Act. Mack maintains that it neither suggested any retail price to be charged by Lewis, nor used any impermissible means to force adherence to a suggested retail price.

Mack also challenges the district court's submission to the jury of Lewis' charge that Mack and Mack Financial conspired to fix the retail prices charged by Lewis. First, Mack argues that Mack and Mack Financial did not have legal capacity to conspire because Mack Financial, Mack's subsidiary, merely performed ministerial acts at the direction of Mack. Second, Mack argues that Lewis presented no evidence showing that Mack and Mack Financial actually conspired to fix prices. Finally, Mack contests the district court's calculation and award of attorneys' fees to Lewis. We conclude that the district court erred in analyzing Mack's sales assistance program under the per se standard of liability. Moreover, we conclude that there is no evidence in the record from which a jury properly applying the rule of reason standard could have found for Lewis. Accordingly, we reverse the district court's judgment.

II. *Discussion.*

A. *Standard of Liability.*

[1] Section one of the Sherman Act literally prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1 (1976). As the Su-

preme Court has long recognized, however, Congress could not have intended a literal interpretation of the word "every," and, consequently, courts have applied a rule of reason analysis to most types of restraints. *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 102 S.Ct. 2466, 2472, 73 L.Ed.2d 48 (1982). Under a rule of reason analysis, the factfinder must scrutinize the intent and effect of the practice challenged, and determine whether the particular practice increases or impairs competition. *Chicago Board of Trade v. United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683 (1918).

At the same time, however, the Court has maintained that combinations formed "for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity" in commerce is illegal per se, and that no showing of the "so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 218, 223, 60 S.Ct. 811, 841, 844, 84 L.Ed. 1129 (1940); *see Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 100 S. Ct. 1925, 64 L.Ed.2d 580 (1980); *Albrecht v. Herald Co.,* 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968). Thus, once a price-fixing agreement is proved, courts have applied a "conclusive presumption" that the Sherman Act prohibited such an agreement. *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, 65, 31 S.Ct. 502, 517, 55 L.Ed. 834 (1911). In addition, courts have applied the per se rule in cases where, although the price-fixing scheme involved was more subtle, or the particular restraint seemed reasonable on its face, repeated experience in analyzing such a restraint under the rule of rea-

son showed that the plan had an anticompetitive effect on the market. *See Arizona v. Maricopa County Medical Society, supra*, 102 S.Ct. at 2473.

Mack argues that it is inappropriate to apply the presumption of unreasonableness imposed by a per se rule to the case at hand, because Mack's program is not a "naked restraint" of trade that explicitily fixes resale prices. In addition, Mack argues that its program involves "substantial competitive virtues." Finally, Mack argues that the per se rule is more generally applied to horizontal rather than vertical arrangements, and notes that its program is implemented vertically.

[2] We agree with Mack that the vertical restraints in this case should not have been evaluated under a per se standard of illegality. After examining the record, we fail to find sufficient evidence that Mack's sales asistance program constituted either a obvious price-fixing scheme, to which the per se rule automatically applies, or a more subtle vertical restraint, to which the per se rule applies when justified by repeated judicial experience.

Mack neither directly nor indirectly fixed the price at which Lewis ultimately sold its trucks. Lewis does not dispute that, under the sales assistance program, Lewis estimates the price at which it intends to sell a truck and then reports this proposed price to Mack when applying for a sales assistance discount on the wholesale price of the truck. In evaluating Lewis' request for sales assistance and price estimates, Mack does not suggest an alternative price to Lewis. Nor does Mack require Lewis to adhere to Lewis' original estimate in making the final sale. Lewis may ultimately charge a lower or higher price than that represented in its request for sales

assistance. Moreover, there is no evidence that Mack has terminated a sale or threatened to refuse a sale because of any dissatisfaction with a price estimate submitted to it by any of its dealers.

In each case cited by Lewis in support of applying a per se standard, the challenged restraints involved either explicit price fixing, where the manufacturer dictated the exact resale price, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), termination or threats of termination, *Cernuto, Inc. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.) *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964), or the agreements were horizontal.[2] *Arizona v. Maricopa County Medical Society, supra*, 102 S.Ct. at 2475.

In the instant case, Mack simply determines the maximum amount, based on the information supplied to Mack by the dealer, by which Mack is willing to reduce its wholesale price (and thereby its profit) in order to assist the dealer in selling a Mack truck. In granting such a discount, Mack may require the dealer to reduce its own profit as well. Mack has a right to ensure that the discount it affords its dealers is passed on to the customer. We cannot accept Lewis' argument that Mack must lower its wholesale price to a figure Lewis deems attractive without requiring a commensurate reduction on Lewis' part.

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[2] In *Maricopa, supra*, the Supreme Court stated that horizontal restraints are "generally less defensible than vertical restraints." 102 S.Ct. at 2475 n. 18.

Finally, we note that the record shows that Lewis made a substantial amount of its sales to large volume fleet customers, who purchased several trucks at once. When sales of a large volume are involved, wholesalers and dealers must often be willing to lower their profit margins in order to meet competitive offers from other companies. We fail to see how a trier of fact could find such a program to be coercive price fixing.

In support of our holding, we note that the Tenth Circuit has recently rejected the argument that a per se rule should have been applied to a vertical price discount system similar to the one involved here. In *AAA Liquors, Inc. v. Joseph E. Seagram and Sons, Inc.*, 705 F.2d 1203, 1204 (10th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 1903, 77 L.Ed.2d 290 (1983), a group of small liquor retailers contended that Seagram's program, by which it gave price supports to a Denver wholesaler who in turn offered discounts to large volume Denver liquor stores in order to increase Seagram's share of the market, constituted per se illegal price fixing under section one. Noting that "all vertical arrangements affecting price do not constitute resale price maintenance agreements," the court held that Seagram's system was neither per se unlawful nor violative of the rule of reason. *Id.* at 1205, 1207-08. The court found that even though Seagram guaranteed a gross profit margin to its wholesaler, as well as conditioning its discounts on the requirement that they be passed on to the customer, Seagram did not "fix" the retail prices. Seagram neither "coerced [the retailers] into offering a particular price [nor] punished [them] if they did not." *Id.* at 1207. The court also stated:

> A supplier who grants discounts to a retailer to permit the retailer to charge competitive prices has

> a legitimate interest in making sure the retailer receiving the discount "is not pocketing the price support instead of passing it on to its customers." [*Id.* at 1206 (citations omitted)].

This reasoning is persuasive and we apply these principles here. We hold that Mack's sales assistance program does not constitute price fixing and, consequently, should not have triggered application of a per se standard of liability.

As stated above, courts have also applied a per se rule in cases where, although the scheme involved was perhaps more subtle or sophisticated, repeated experience in analyzing such a restraint under the rule of reason enabled a court "to predict with confidence that the rule of reason [would] condemn it." *Arizona v. Maricopa County Medical Society, supra,* 102 S.Ct. at 2473. In the case at hand, we are unable to conclude that the rule of reason would condemn Mack's sales assistance program. Nor do we find sufficient judicial "experience" with this type of restraint to support condemning it. Lewis cites no case in which a program such as Mack's has been found illegal. On the other hand, we note instances where reviewing courts have upheld the legality of plans similar to Mack's. *See AAA Liquors, Inc. v. Joseph E. Seagram and Sons, Inc., supra,* 705 F.2d at 1208; *Butera v. Sun Oil Co.,* 496 F.2d 434 (1st Cir. 1974) (gasoline supplier's discount system whereby supplier charged wholesale price on delivery to retailer and later credited retailer for discount amount was not resale price maintenance where retailers were free to set their own price for gasoline); *Sun Oil Co. v. Vickers Refining Co.,* 414 F.2d 383 (8th Cir. 1969) (allowing a contract formula between

two gasoline suppliers in which first supplier sold to second supplier and guaranteed a minimum profit to second supplier based on the price actually received by second supplier from its "jobbers").

The Supreme Court has cautioned against applying a per se standard to vertical price restraints unless they are shown to have a "pernicious effect on competition," or that they lack "any redeeming virtue." *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58, 97 S.Ct. 2549, 2561, 53 L.Ed.2d 568 (1977), *citing Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5, 38 S.Ct. 514, 2 L.Ed.2d 545 (1958). Per se rules of illegality are approriate only when they relate to conduct that is "manifestly anticompetitive." *Id.* 433 U.S. at 50, 97 S.Ct. at 2557. The record shows no basis for finding that Mack's sales assistance program constitutes price-fixing or that this program creates a "pernicious effect on competition." Thus, we determine that the district court abused its discretion in applying a per se rather than a rule of reason standard.

B. *Rule of Reason.*

[3] Had the district court submitted Mack's program under a rule of reason standard, the factfinder would have been required to decide whether, under all the circumstances of the case, the restrictive practice imposed an unreasonable restraint on competition. *Arizona v. Maricopa County Medical Society, supra*, 102 S. Ct. at 2472. Factors to be considered would have included the nature and effect of the restraint, the "evil" believed to exist, the purpose or end sought to be obtained, and the intent of the party imposing the restraint. *Chicago*

*Board of Trade v. United States, supra,* 246 U.S. at 238, 38 S.Ct. at 243.

In *AAA Liquors, supra,* the Tenth Circuit applied a rule of reason analysis in evaluating Seagram's price support system and concluded that Seagram's alleged restraints were not anticompetitive. The court found no evidence of intent by Seagram to "cripple" small retailers as competitors, but found rather that the purpose of the discount pragram was to increase Seagram's sales as against the major competing brands. *Id.* at 1207-08. The *AAA* court concluded by finding that the effect of the discount program, in fact, was to lower retail prices to consumers and increase interbrand competition, noting:

> The ultimate test of legality, under the rule-of-reason analysis is whether the particular restraint increases or impairs competition. [*Id.* at 1208].

Employing the same test in the instant case, we observe that the evidence points without contradiction to the conclusion that the purpose of Mack's discount program is not to force adherence to any particular price scheme of Mack's, but to promote sales of Mack trucks, particularly where the potential sale is one of a large volume. The record contains no evidence of an intent on the part of Mack to "cripple" its dealers. Further, the record establishes that during the period complained of, 1978-1980, the majority of trucks sold by the ten dealers in Lewis' region were made without sales assistance. Presumably, if Mack were coercing its dealers to apply for sales assistance, the record would reflect that dealers could rarely make sales without Mack's assistance. The record does not so reflect. Indeed, Lewis is the only one of Mack's ten regional dealers who sold more than

half of its trucks under the sales assistance program. As already noted above, a large percentage of Lewis' particular market involves sales to large-volume fleet buyers.[3] Although Lewis may be unhappy with the wholesale prices charged by Mack, it does not necessarily follow that Lewis is entitled to a remedy under the antitrust laws.

[4] After examining the entire record, we fail to see how Mack's program can be characterized as anything other than pro-competitive. If Lewis' representations in its requests for sales assistance are true, Lewis presumably would not be able to offer a competitive price without sales assistance. The ultimate customer would therefore probably pay a higher price, and Lewis would make no sale or profit at all. Thus, the effect of the discount program, as in *AAA Liquors,* is to lower retail prices to customers and increase interbrand competition. Lewis offers no evidence to the contrary. Consequently, we conclude, as a matter of law, that Mack's discount program has not been shown to be manifestly anticompetitive and, under a rule of reason standard, does not violate section one of the Sherman Act.

III. *Conclusion.*

The district court erred in applying a per se rule rather than a rule of reason in evaluating Mack's sales assistance program. We find it unnecessary to remand for a new trial, however, because we hold that Mack's

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[3]For the period in question, approximately 125 of the 277 sales made by Lewis under the program were to the same purchaser.

program does not violate the Sherman Act when evaluated under a rule of reason. Because we determine that Mack did not violate section one under the first of Lewis' theories of liability, we need not address Lewis' conspiracy theory. Nor do we need to examine Mack's claim that Lewis failed to establish any injury caused by Mack's alleged price restraints. In sum, we hold that Mack Trucks was entitled to judgment in its favor as a matter of law. The district court's judgment, as well as its award of attorneys' fees, is therefore reversed, and this matter is remanded to the district court with directions to dismiss Lewis' claim under section one of the Sherman Act.

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## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV80-L-301

LEWIS SERVICE CENTER, INC.,
a corporation,

*Plaintiff,*

vs.

MACK TRUCKS, INC.,
a corporation,

*Defendant.*

MEMORANDUM AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

(Filed March 3, 1982)

Now before the court are cross-motions for summary judgment, filings 16 and 32, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

A motion for summary judgment may be granted only if all the evidence before the court demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c). In this case, a summary judgment would be proper if the undisputed evidence now before the court demonstrates that there either was or was not a violation of § 1 of the Sherman Act, 15 U.S.C. § 1, by illegal price fixing.

It is well settled law that price fixing, specifically resale price maintenance, is a per se violation of the Sherman Act when the wholesaler sets minimum resale prices and enforces the price. *Albrecht v. Herald Co.*, 390 U.S. 145, 152 (1968); *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *Arnott v. American Oil Co.*, 609 F.2d 873, 885 (C.A. 8th Cir. 1979). See, also, III Areeda & Turner, *Anti-Trust Law*, ¶ 734b (1978). This may result whether or not the retailers voluntarily agree and contract or are reluctantly coerced into the actions. The plaintiff alleges that this case presents a situation where there has been resale price maintenance, while the defendant differs with that conclusion. The difference in the parties' positions leaves the clear impression that there is significant disagreement over the facts of the case, making a motion for summary judgment improper.

I believe that there are at least two issues of material fact that render this case inappropriate for summary

judgment. First, there is a paucity of evidence concerning whether administration of the dealer assistance program by Mack Trucks effectively sets any resale prices. Second, there is a substantial question whether administration of the resale program would amount to price maintenance, if there were any price set by the program.

Counsel for the plaintiff suggests that Mack Trucks would not approve a transaction under the program unless the price offered to the retail customer met its specifications. It alleges that this is done indirectly through setting the reduction in wholesale and enforcing a maximum profit. Mack Trucks counters with the argument that the dealer was free to set retail prices and then come to it for approval of the transaction. In support of this position Mack Trucks intimates that approval of the transaction occurred after, not before, the completion of the transaction. Such an argument does not cover the field, however, because a series of post-transaction approvals or denials could influence the price on a subsequent transaction, thereby amounting to some sort of price fixing.

The issue of whether fixed prices, if any, are being enforced is likewise in substantial doubt. The plaintiff claims that approval or disapproval of dealer assistance on any given transaction amounts to enforcement of a price, because dealers will not go forward with a transaction in the absence of the extra profit from dealer assistance. Other evidence in the record, however, indicates the contrary, because a dealer may be willing to accept a transaction without any profit if it believes that subsequent sales of parts and service fees will result in a profit overall.

Accordingly, summary judgment is inappropriate. Other issues may be in dispute, but these two are enough to merit denial of the motions.

IT THEREFORE HEREBY IS ORDERED that the plaintiff's motion for summary judgment, filing 32, and the defendant's motion for summary judgment, filing 16, are denied.

Dated March 2, 1982.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

**APPENDIX C**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV80-L-301

LEWIS SERVICE CENTER, INC.,
a corporation,

*Plaintiff,*

vs.

MACK TRUCKS, INC.,
a corporation,

*Defendant.*

MEMORANDUM AND ORDER ON
MOTION FOR JUDGMENT NOTWITHSTANDING
THE VERDICT OR IN THE ALTERNATIVE
FOR A NEW TRIAL

(Filed September 14, 1982)

Pending is the defendant's motion for judgment notwithstanding the verdict or in the alternative for a new trial, filing 84.

After a full and careful review of the briefs and evidence, I conclude that the motion for judgment notwithstanding the verdict should be denied. In the interest of moving the case to ultimate disposition without further delay, I shall not write in detail, but shall briefly state the basis for my decision.

*Refrigerated Food Line, Inc. v. Republic Industries, Inc.*, 605 F.2d 412, 418 (C.A. 8th Cir. 1979), sets the standard:

> ". . . Such a motion must be denied unless the movant's case is so strong as to leave no room for reasonable difference of opinion. The evidence must be viewed in the light most favorable to the party opposing the motion, and that party is entitled to the benefit of all inferences favorable to him that reasonably may be drawn from the evidence. . . ."

To be sufficient to affirm the verdict, of course, the evidence must be strong enough to enable a reasonable person to find a violation of Section 1 of the Sherman Act and damage proximately resulting therefrom.

Strong argument has been made on behalf of the defendant that the plaintiff has failed under both its theories—the first being that Mack Trucks coerced Lewis Service Center to fix at an amount satisfactory to Mack Trucks the price of trucks sold by Lewis and the second being that Mack Trucks and Mack Financial voluntarily conspired to fix the retail prices charged by Lewis. However, there was evidence from which a jury reasonably could find that the theories were factually supported.

Essentially, the evidence showed, in its form most favorable to the plaintiff, that Mack Trucks sells its trucks to Lewis at a specific price. When construction of the truck is finished, title is immediately transferred to Lewis and a note for the list price is executed by Mack Trucks on behalf of Lewis in accordance with a power of attorney and then is placed for collection with Mack Financial Corporation, a wholly owned subsidiary of Mack Trucks. The full amount of the note is collected by Mack Financial Corporation. If Lewis is not able to sell the truck at a price which Lewis considers would give it an acceptable profit, Lewis may request sales assistance from Mack

Trucks, by which Mack Trucks agrees to reduce its price to Lewis, conditioned upon Lewis' not making a profit in excess of four per cent of the list price.[1] After the resale by Lewis is complete, Mack Trucks may and does demand verification of the profit, not only on the truck as sold to Lewis but also on the local extras - items placed on the trucks by Lewis not purchased from Mack Trucks. If Mack Trucks finds that the profit exceeds the four per cent or a figure it considers unreasonable, Mack Trucks then reinstates the full amount of the list price or something less than the full amount of the list price but above the amount agreed to at the time the sales assistance was requested and negotiated.

The evidence, of course, is in conflict as to whether the list price was set by Mack Trucks artificially high in order to and with the effect of causing Lewis to seek sales assistance often. Whether it was so set and whether that in combination with the limitation upon profit, enforced both prospectively and retroactively by alteration of the list price, constituted coercion of Lewis by Mack Trucks to enter into the sales assistance program, with the result of a retail price satisfactory to Mack Trucks, were questions for the jury.

Similarly, whether Mack Trucks and Mack Financial Corporation were separate entities capable of conspiring and whether they voluntarily did agree to a plan to fix the retail price of trucks sold by Lewis, which had the purpose and effect of fixing those retail prices, were questions for the jury.

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[1]The four per cent figure is not precisely accurate, but for purposes of this decision it is sufficiently accurate.

There was evidence that the fixing of prices was a proximate cause of injury to Lewis' business or property. There was testimony, which the jury was entitled to believe, that Lewis would have been able to sell trucks at a higher price, except for the restrictions of the sales assistance program. The jury concluded that that amount was $300,000. Judgment, accordingly, was entered in triple that amount.

The principal cases leading me to the foregoing conclusions are *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Son, Inc.*, 340 U.S. 211 (1951); *Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *Arnott v. The American Oil Co.*, 609 F.2d 873 (C.A. 8th Cir. 1979); and *Greene v. General Foods Corporation*, 517 F.2d 635 (C.A. 5th Cir. 1975), *cert. denied*, 424 U.S. 942.

The defendant has also moved for a new trial under Rule 50(b) of the Federal Rules of Civil Procedure. In *Slatton v. Martin K. Eby Construction Co., Inc.*, 506 F.2d 505, 508, n. 4 (C.A. 8th Cir. 1974), *cert. denied*, 421 U.S. 931 the court said that in passing on a motion for new trial:

> ". . . [T]he trial court is not limited to viewing the evidence in the light most favorable to the prevailing party. It may weigh evidence, disbelieve witnesses, and grant a new trial even when there is substantial evidence to sustain the verdict. . . ."

I have viewed the evidence in light of that discretion, and I conclude that I shall not set aside the verdict.

IT THEREFORE HEREBY IS ORDERED that the defendant's motion for judgment notwithstanding the verdict or in the alternative for a new trial, filing 84, is denied.

Dated September 13, 1982.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

## APPENDIX D

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
September Term 1983

No. 82-2158-NE

LEWIS SERVICE CENTER, INC.,

*Appellee,*

vs.

MACK TRUCKS, INC.,

*Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

Petition of appellee for rehearing and suggestions for rehearing en banc filed in this cause having been considered, together with response of appellant thereto, it is now here ordered by this Court that the petition for rehearing and suggestions for rehearing en banc be, and it is hereby, denied.

November 4, 1983

## APPENDIX E

98th Congress
1st Session

Union Calendar No. 119

H. R. 2912

[Report No. 98-181]

To authorize appropriations to carry out the activities of the Department of Justice for fiscal year 1984, and for other purposes.

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IN THE HOUSE OF REPRESENTATIVES
May 4, 1983

MR. RODINO introduced the following bill; which was referred to the Committee on the Judiciary

May 16, 1983

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

[For text of introduced bill, see copy of bill as introduced on May 4, 1983]

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A BILL

To authorize appropriations to carry out the activities of the Department of Justice for fiscal year 1984, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Department of Justice Appropriation Authorization Act, Fiscal Year 1984".

as in effect on October 1, 1982.

SEC. 14. None of the sums authorized to be appropriated by this Act may be used for any activity the purpose of which is to overturn or alter the per se prohibition of resale price maintenance, in effect under the Federal antitrust laws.

SEC. 15. None of the sums authorized to be appropriated by this Act may be used to transfer any position from any legal division of the Department of Justice to any office of any United States Attorney or to pay the salary of any employee occupying any such position so transferred after April 1, 1983.

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98th Congress
1st Session

S. J. RES. 105

Calling upon the Department of Justice and all other appropriate Federal agencies to enforce Federal antitrust laws including the prohibition against vertical price restraints.

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IN THE SENATE OF THE UNITED STATES

May 18 (legislative day, May 16), 1983

MR. RUDMAN (for himself, MR. NUNN, MR. WEICKER, MR. GORTON, MR. BAUCUS, MR. BINGAMAN, MR. BRADLEY, MR. CHAFEE, MR. COHEN, MR. D'AMATO, MR. EXON, MR. FORD, MR. GLENN, MR. HEINZ, MR. HUMPHREY, MR. KENNEDY, MR. LAUTENBERG, MR. MATTINGLY, MR. MELCHER, MR. METZENBAUM, MR. PERCY, MR. PROXMIRE, MR. QUAYLE, MR. STAFFORD, MR. TSONGAS, MR. WILSON, and MR. BOSCHWITZ) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary.

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JOINT RESOLUTION

Calling upon the Department of Justice and all other appropriate Federal agencies to enforce Federal antitrust laws including the prohibition against vertical price restraints.

Whereas the Congress in 1890 enacted the Sherman Act to prohibit "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations . . .";

Whereas the United States Supreme Court has consistently held that vertical price restraints are per se violations of the Sherman Act;

Whereas the Congress upheld the Supreme Court's interpretation of the Sherman Act prohibiting vertical

price restrictions when in 1975 portions of the Miller-Tydings Act and the McGuire Act authorizing State laws permitting "fair-trade" restrictions were repealed;

Whereas consumers benefit from vigorous price competition at the retail level and are hurt by vertical price-fixing conspiracies which raise consumer prices and infringe upon retailers' rights to free trade;

Whereas the United States Attorney General is charged with instituting proceedings to prevent and restrain violations of the antitrust laws;

Whereas the United States Attorney General, in contravention of his responsibility for enforcing the antitrust laws, is not actively enforcing the law regarding vertical price restraints; and

Whereas the Solicitor General of the United States Department of Justice, on behalf of the United States, has filed an *amicus curiae* brief with the Supreme Court which, in part, advocates weakening the law regarding vertical price restraints: Now therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the United States Attorney General and all other appropriate Federal agencies and officials shall faithfully and vigorously enforce the Federal antitrust laws, including the prohibition against vertical price restraints, and shall cease propounding arguments in court designed to weaken the law prohibiting vertical price restraints. To the extent that the Attorney General or other Federal officials shall deem it necessary to change the law prohib-

iting vertical price restraints, such officials shall forward proposed legislation embodying such changes to the Congress for proper consideration.

The Committee has already taken testimony from the Department and additional hearings will be scheduled in an attempt to seek the necessary clarification and to give the FBI an opportunity to explain and justify those changes which are substantive. The Committee agrees that if changes in the guidelines are needed because of specific problems the FBI has encountered, these changes should be made. However, to date, neither the FBI nor the Department has produced any evidence justifying such changes.

Until that evidence is provided and until the consultation and clarification process can be completed, the Committee believes the status quo of the Levi guidelines should be maintained. Section 13 is designed to accomplish that purpose by delaying implementation of the Smith guidelines for a limited period of time. The language of H.R. 2912 as introduced delayed implementation until September 30, 1984—the end of fiscal year 1984. During the mark-up, however, an amendment was offered and adopted by voice vote which delays implementation until January 1, 1984.

It is the Committee's expectation that resolution of these issues will be achieved within the time frame provided for in Section 14, as amended, and commits itself to working closely with the Department to achieve that goal. The Committee is compelled to note, however, that adoption of § 14, as amended, is meant to send a message to the Department regarding the depth of its concern

about the Smith guidelines and the importance of the issues raised by them.

*Section 14. Resale price maintenance prohibition*

In Section 14, the Committee directs that no funds appropriated by H.R. 2912 shall be used to "overturn or alter the per se prohibition of resale price maintenance, in effect under the Federal antitrust laws." The Committee takes this action to ensure that the national policy against vertical price-fixing will continue to be upheld, and not weakened, by officials of the Antitrust Division whose constitutional duty it is to enforce the antitrust laws.

Despite an unbroken chain of Supreme Court decisions going back 70 years and Congress express bipartisan message in passing the Consumer Goods Pricing Act of 1975, the current policy of the Antitrust Division is to ignore, or distinguish, the per se prohibition on resale price maintenance ("RPM"). Statements by Department officials that they would not enforce the per se ban on retail price fixing, or do so selectively, coupled with the total failure of the Department to challenge such conduct have sent a disquieting message of permissiveness to potential violators. More recently, the Department has urged the Supreme Court[1] in a private action to which the United States is not a party, to overturn a precedent that has served as the polestar for congressional and executive action over that same period.

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[1]Monsanto Co. v. Spray-Rite Service Corp., *petition for cert. filed,* 51 U.S.L.W. 3461 (Dec. 7, 1982) (No. 82-914); *cert. granted* 51 U.S.L.W. 3633 (Feb. 28, 1983).

As recently as March 10, 1983, before the Subcommittee on Monopolies and Commercial Law,[2] Assistant Attorney General Baxter reiterated his view that RPM was not strictly prohibited by either Congress or the Supreme Court.[3] The statement is troubling because it ignores the consistent treatment accorded the issue by the Supreme Court since 1911.

In *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*, 220 U.S. 373 (1911), the Supreme Court struck down a resale prices maintenance scheme as illegal per se[4] by reasoning that the Sherman Act has accorded all participants in the distribution of goods the same freedom to make business decisions and that simply because a manufacturer makes the product and initiates the distribution scheme, "it does not follow [that] . . . he may impose on purchasers every sort of restriction." 202 U.S. at 404. In every situation in which the Supreme Court has sub-

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[2]See Oversight and Authorization Hearings before Subcommittee on Monopolies and Commercial Law, March 10, 1983, Transcript of Proceedings, at pp. 17-19, 38-40, 49-55.

[3]For its part, the FTC has continued to support the rule that vertical price-fixing is per se illegal, most recently in its pending action in Russell Stover Candies, Inc. v. FTC (no. 9140, July 7, 1982) appeal docketed, No. 82-2036 (8th Cir.) (FTC Chairman Miller, dissenting).

[4]Before extending the rule to vertical price fixing, the Supreme Court first crafted the so-called "per se" standard of illegality in the context of horizontal antitrust cases. *See, e.g., United States v. Joint-Traffic Ass'n, 171 U.S. (1898); United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd, 175 U.S. 211 (1899).*

sequently been faced with the issue of vertical price restraints, it has reaffirmed the holding in *Dr. Miles.*[5]

It is also significant that the Supreme Court held to this view even during the same period that it openly expressed uncertainty as to the appropriate treatment of non-price vertical restraints.[6] It, therefore, cannot be asserted—at least by resort to legal precedent—that the authorities on this point remain unsettled although that has been precisely the argument posited by the Department in its amicus filings.[7]

Congress, likewise, in 1975 affirmatively expressed its view that retail price-fixing is illegal under the anti-

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[5]*See* United States v. Colgate Co., 250 U.S. 300 (1919); United States v. Schrader's & Son, 252 U.S. 85 (1920); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); United States v. Line Material Co., 333 U.S. 287 (1948); Kiefer-Stewart Co. v. Jos. E. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Parke Davis & Co., 362 U.S. 29 (1960); Simpson v. Union Oil Co., 377 U.S. 13 (1964); California Liquor Dealers v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Rice v. Norman Williams Co., 102 S.Ct. 3294, 458 U.S. — (1982).

[6]In a 14-year period (1963-1977) the Supreme Court changed its ruling on vertical territorial restraints no less than three times, first subjecting them to a "rule of reason" analysis (White Motor Co. v. United States, 372 U.S. 253 (1963)), then declaring them illegal per se (United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)), and finally returning to the rule of reason standard (Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)). Throughout this time of analytical revision, the Court never considered judging vertical price-fixing under any test other than the illegal per se standard, and in *GTE Sylvania, supra,* the Court expressly noted that fact. *See* 433 U.S. at 51 n. 18.

[7]*See,* most recently, Brief of the Department of Justice, Monsanto Co. v. Spray-Rite Service Corp., No. 82-914, at pp. 5, 15-18.

trust laws by passing the Consumer Goods Pricing Act.[8] This action culminated a determined effort by Congress to reach a uniform policy on the RPM question that, with the benefit of past experience, would benefit consumers nationwide. The history of Congressional involvement is therefore instructive.

Following the enactment of the Sherman Act in 1890, Congress remained content with the Act's prohibition on resale price-fixing until the Depression. However, during this same period, individual states proceeded to enact "fair trade" laws, which permitted a manufacturer to enter into an agreement stipulating the minimum price at which a product could be sold. Because such laws invariably affected goods in interstate commerce, in violation of the federal antitrust laws, Congress responded by passing in 1937 the Miller-Tydings Act,[9] thereby exempting state fair trade laws from the reach of the Sherman Act. In 1952, Congress passed the McGuire Act,[10] which permitted suppliers even greater authority to fix resale prices by extending the privity of fair-trade contracts to "non-signer" distributors.

By 1975,[11] repeal of the fair trade laws was called for by, among others, President Ford, the Department of Jus-

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[8]89 Stat. 801 (1975), *amending* 15 U.S.C. §§ 1, 45(a) (1976).

[9]50 Stat. 693, *amending* 15 U.S.C. § 1 (1976).

[10]60 Stat. 632, *amending* 15 U.S.C. §§ 45, 45 note (1976).

[11]In the interim, many states had repealed or curbed their fair trade statutes; four states had their own statutes declared unconstitutional; and 25 states have declared "non-signer" clauses to be unconstitutional. *See* P. Areeda, *Antitrust Analysis*, 517 (1974).

tice and the Federal Trade Commission.[12] Studies conducted by the Justice Department under President Nixon indicated that the consumer would be saved $1.2 billion by the elimination of the fair trade laws and that such practices increased prices for the affected goods by 18 to 27 per cent.[13] President Reagan, writing at the time for the Copley News Service, also decried these practices. In a column reprinted in the Congressional Record, Mr. Reagan condemned resale price maintenance as stifling competition, adding to inflation and bereft of consumer benefits.[14]

Congress responded decisively: After both the House and Senate Judiciary Committees unanimously reported the legislation, the Senate approved the bill by unanimous consent;[15] and the House voted 380 to 11 in favor of the

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[12]Contemporaneous with Congress' reconsideration of the problems posed by the fair trade laws, other nations also took action to correct similar economic effects stemming from vertical price-fixing. In 1973, the West German parliament passed a law changing what had been a limited, rule-of-reason restriction on vertical price fixing to an absolute ban. *See* 1973 BGB1, 917 (1973 Amendment to Act Against Restraints of Competition). In 1976, British Parliament passed the Resale Prices Act which prohibits the enforcement by suppliers, acting individually or collectively, of a minimum resale price. *See A Review of Monopolies and Mergers Policy* (London 1978) at p. 126. Among other nations, Austria, Canada, Denmark, Finland, France, Ireland, Japan, the Netherlands, Norway, Spain and Switzerland all prohibit or severely limit resale price maintenance. *See Comparative Summary of Legislations on Restrictive Practices* (OECD Publications 1978).

[13]See S. Rep. No. 94-466, 94th Cong., 1st Sess., pp. 1-3 (1975).

[14]121 Cong. Rec. 1268 (Jan. 23, 1975).

[15]121 Cong. Rec. S20874 (Dec. 2, 1975).

bill.[16] In signing H.R. 6971 into law on December 12, 1975, President Ford succinctly stated the legislation's intended effect:

> [the Act] will make it illegal for manufacturers to fix the prices of consumer products sold by retailers. This new legislation will repeal laws . . . which amend the Federal Antitrust Laws so States could authorize *otherwise illegal agreements* between manufacturers and retailers setting the price at which the product could be sold to consumers.[17]

In this context of congressional and Supreme Court consensus, the Committee notes that in the past two years, no actions involving resale price maintenance have been brought to court. During the same interval, however, the Department has expended substantial resources to intervene on behalf of defendant-manufacturers charged with pricing conduct violations at both the trial and appellate levels.[18]

The Division's amicus intervention in *Monsanto Co. v. Spray-Rite Service Corp.*, No. 82-914 (1983), is particularly disturbing. *Monsanto* is a private lawsuit involving a manufacturer's termination of a distributor of herbicides. Although neither of the parties to the action challenged the continued validity of the per se rule as applied to vertical price restraints, the Department of Justice

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[16]121 Cong. Rec. H7104 (July 21, 1975).

[17]Public Papers of President Gerald R. Ford, vol. 11, no. 50, at p. 1368 (emphasis supplied).

[18]See, e.g., Battle v. Lubrizol Corp., 673 F.2d 984 (8th Cir. 1982); Paschall v. Kansas City Star Co., No. 81-1963 (8th Cir. 1982); O.S.C. Corp. v. Apple Computer, No. CV-81-6132 (C.D. Cal. 1983).

side-stepped the narrower questions raised by the parties,[19] and urged the Supreme Court to review the case as a means of revoking the 70-year old holding in *Dr. Miles*.[20] At the very least, this expansive use of certiorari to accomplish a sweeping revision of the law relating the RPM indicates an insensitivity to the respective roles of the Congress and the Judiciary in the formulation and application of antitrust policy. More seriously, the Department's conduct in this private matter may prove to be a

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[19]Before the Seventh Circuit and, now, the Supreme Court, the appellant-manufacturer has urged for reversal of a damage verdict on the familiar grounds of insufficiency of evidence and improper jury instruction.

[20]In its arguments to the Court, the Department makes the point that "while the 1975 legislation terminated the States' authority to immunize certain conduct from all antitrust scrutiny, it does not prescribe the standard for such scrutiny." DOJ Brief, at p. 17 n.26. In his subsequent appearance before the Subcommittee on Monopolies and Commercial Law, on March 10, 1983, Assistant Attorney Baxter indicated what he considered to be the appropriate test in the absence of an explicit statutory command: "Well, I call it either the rule of reason interpretation under Section 1 of the Sherman Act that Congress enacted in 1890 or, alternatively, following the Congressional language that appears throughout the Clayton Act, where the test is: Is the effect likely to significantly lessen competition?" Transcript of proceedings, at p. 55. Besides disregarding the 70 years of substantive content provided by the Supreme Court in the area of vertical price-fixing, this approach would also cast in doubt the standard to be applied to horizontal price fixing. More significant, it ignores the well documented history of the 1975 legislation that placed Congressional opinion about RPM in line with that of the Court. See, e.g., H.R. 94-341, 94th Cong., 1st Sess. 2 (1975) in which it is explained:

"An agreement between a manufacturer and a retailer that a retailer will not resell the manufacturer's produce below a specified price is an obvious form of price fixing. As such, it is per se illegal under Section 1 of the Sherman Act. . . ."

wholly unjustified allocation of resources in a bold attempt to circumvent the Congress.

Only last year, the Supreme Court in *Arizona v. Maricopa Medical Society*, 73 L.Ed. 2d 48 (1982), counselled litigants challenging the per se rule in price-fixing cases to direct their arguments for change to the Congress.[11] 73 L.Ed. 2d at 65. The Committee considers this to be sound advice, and so indicated to Assistant Attorney General Baxter at the time of his appearance before the Subcommittee on Monopolies and Commercial Law on March 10, 1983. Thereafter, the Department has persisted in its public statements and amicus intervention projects, all aimed at overturning congressional policy in the area of resale price maintenance. The inclusion of Section 14 in HR. 2912 is the Committee's missive that it will not tolerate change in the carefully crafted, and congressionally-approved, antitrust policy concerning retail price-fixing without the consent of the people's elected representatives.

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[11] *Cf.* Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories (No. 81-827) (Feb. 23, 1983). In that decision, involving an application of the Robinson-Patman Act, the Court stated:

"Although Congress is aware of these criticisms [of policy and effect], the Act has remained in effect for almost half a century. And it is certainly 'not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of relevant material, what was in fact the intent of Congress.'" *Slip Opinion* at p. 20, *quoting* United States v. Cooper Corp., 312 U.S. 600, 606 (1941).